

I N D E X

MARCH 4, 2015

Government's Witness:	Direct	Cross	Redirect
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Peter Gawlinski	5	19	
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Certificate of reporter			58
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E X H I B I T S

Government's Exhibits:	Marked	Admitted
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Exhibit 1		13
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Exhibit 2		14
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P R O C E E D I N G S

(The proceedings convened on March 4, 2015, commencing at 11:10 a.m.)

THE COURT: This is the time and place set for hearing on the motion of defendant to clarify condition of supervised release. I will note that that is Document 50, and then 54 is the response of the United States.

Before we proceed, if counsel would enter their appearance, please.

MR. VALKOVCI, JR.: Good morning, Your Honor. John Valkovci on behalf of the United States. With me this morning is United States Probation Officers Warren Johnston and Peter Gawlinski.

MR. BROWN: Morning as well, Your Honor. May it please the Court, Chris Brown on behalf of Brandon Brothers.

THE COURT: All right. Well, good morning to both of you and to the others present today.

The nature of the motion is such that I will hear from counsel as to your preference as to how to proceed in terms of -- normally the movant would proceed first, but perhaps it makes sense to do it the other way today.

Mr. Valkovci, your position.

MR. VALKOVCI, JR.: Your Honor, perhaps maybe a hybrid approach would be more appropriate in this case. Given the government's argument in its brief, I can see why the

1 Court would be asking that. However, just so the Court's
2 clear, I think the government will be abandoning our
3 jurisdictional argument.

4 Upon further reflection, I took a further look at
5 Rule 32.1 of the Rules of Criminal Procedure, and although
6 31.2(c) talks about modification, when I spent some time
7 reading the advisory committee notes, the advisory committee
8 notes with respect to Rule 32.1(b) talks about the probationer
9 should have the right to apply to the sentencing court for a
10 clarification or change of conditions. And it goes on to
11 read, "As the committee notes, this is important for two
12 reasons. And the first reason, Your Honor, I think is
13 applicable here, and that is the probationer should be able to
14 obtain resolution of a dispute over an ambiguous term or the
15 meaning of a condition without first having to violate it.

16 And rather than put Mr. Brothers in a Catch-22
17 situation, the government would simply concede that we're not
18 conceding the term is ambiguous in any way, but we believe
19 that that Rule 32.1, in conjunction with the advisory
20 committee notes, provides the Court with sufficient
21 jurisdiction to entertain his current motion today.

22 Having said that, Your Honor, I would submit to the
23 Court that perhaps the best way to proceed is to have
24 Mr. Brothers place his request on the record and his basis for
25 his request.

1 THE COURT: All right. Well, I will note that I
2 agree with your analysis with regard to why it would be
3 appropriate for the Court to hear the motion, since it appears
4 to be inappropriate to force the defendant to violate and then
5 find out if it is a violation or not. So I agree, so we will
6 proceed in that manner then.

7 Thank you.

8 MR. VALKOVCI, JR.: Thank you, Your Honor.

9 THE COURT: Attorney Brown, you may then proceed
10 with your case.

11 MR. BROWN: So the Court's aware, I have a new
12 fancy computer. My new fancy computer does not work with my
13 printer here in the Johnstown office so, unfortunately, I was
14 unable to print my notes for the hearing today, and so I'm at
15 somewhat of a deficit here scrolling through my computer. So
16 if the Court would be patient with me, I'd appreciate it.

17 Just to lay some foundation for the record,
18 although I think it's fairly clear: Mr. Brothers was
19 sentenced by this Court June 7th, 2012, to a period of
20 incarceration of six months, followed by 15 years of
21 supervised release. And that sentence was imposed following
22 his guilty plea to a single count of possession of child
23 pornography.

24 He was released to supervision in August of 2012.
25 And I attached as an exhibit to the motion to clarify

1 conditions that we filed, and the reason we're here today,
2 Exhibit A, which is the judgment in that case. And I did that
3 for the Court's convenience, and I'm sure the Court has looked
4 at it and re-reviewed it before today. I noted that this
5 imposed many standard conditions, as well as additional
6 conditions.

7 The condition in question is found on page 4 of the
8 J&C. And I have Exhibit A, which is the J&C, on the monitor.
9 And the highlighted portion is the one that raised some
10 questions between the parties. I don't know if the Court can
11 see that, if the Court has a copy in front of it. I will read
12 it into the record. It says, "The defendant shall participate
13 in a mental health and/or sex offender treatment program
14 approved by the probation officer until such time as the
15 defendant is released from the program by the Court.

16 "The defendant shall abide by all program rules,
17 requirements, and conditions of the sex offender treatment
18 program, including submission to polygraph testing to
19 determine if he has been compliant with the conditions of
20 release. The probation office is authorized to release the
21 defendant's presentence report to the treatment provider if so
22 required."

23 Mr. Brothers, as I said, was released to
24 supervision in August of 2012, and he did participate in the
25 sex offender treatment program called Project Point of Light.

1 And as reflected in Defendant's Exhibit B, this is a
2 recommendation from that sex offender treatment program saying
3 that he's successfully completed their program and that no
4 further treatment is needed.

5 Following that discharge from that sex offender
6 treatment program, Mr. Brothers was advised by his supervising
7 probation officer -- and I'm going to approximate because I
8 don't know the exact date, but it was the summer -- I believe
9 it was the summer of 2014 that he was required to submit to a
10 polygraph examination.

11 And it is our position, Your Honor, that this
12 Court's ordered conditions of supervision are clear and do not
13 include a condition that he submit to periodic polygraph
14 examinations -- whether they be annual, monthly, weekly,
15 daily, hourly -- once he's discharged from the sex offender
16 treatment program. That this is a condition that he is not
17 required to observe by this Court and, therefore, it is a
18 condition that the probation office has no authority to
19 enforce.

20 In addition to that, Your Honor, it's our position
21 that the administration of polygraph examinations after
22 someone has been successfully discharged from a sex offender
23 treatment program is tantamount to a modification of
24 conditions of supervision.

25 There was some discussion between myself and the

1 probation office prior to the filing of this motion, and I
2 suggested if probation identified a need for annual polygraph
3 examinations, then why don't they file a modification request.
4 The response that I got -- and I'm paraphrasing, and I hope I
5 understand it correctly -- is that no modification is needed
6 because the polygraph condition is an existing condition, as
7 ordered by this Court, that they have the authority to
8 enforce.

9 And so then, as the Court's identified, there was a
10 weighing of what to do. Do we wait for a violation and come
11 in front of this Court in a posture that risks Mr. Brothers
12 going to jail, and that's certainly not something that is his
13 desire.

14 So, instead, it was suggested and thought up by my
15 office and suggested by the probation office, to file a motion
16 to clarify this condition in support of our position. And it
17 is our position that this is not an existing condition, that
18 the Court's intent from the language in its order is that
19 polygraph tests are a condition of a sex offender treatment
20 program that is approved by the probation office.

21 I don't think the probation office is going to come
22 in today and say they're board certified sex offender
23 treatment providers. This is obviously something outside the
24 United States Probation Office, and that as a condition of
25 that treatment outside the confines of the probation office,

1 that once that treatment is done, is discharged, successfully
2 completed, then the polygraph testing condition is no longer.

3 So that's our position, Your Honor. And,
4 obviously, the probation office disagrees. I know the U.S.
5 Attorney's Office is going to support the probation office's
6 position and interpret it in a different way than we do, and
7 that's why we're here.

8 With the Court's permission, that's all I have
9 right now, but I know I'm going to have to respond to
10 arguments made by the government, so I appreciate if the Court
11 would give me an opportunity to respond rather than laying out
12 all my arguments before the government's made any arguments to
13 counter what I've said already.

14 THE COURT: The government has, in its response,
15 made an extensive number of arguments. Do you not wish to
16 respond to those as part of your presentation, or do you want
17 to wait?

18 MR. BROWN: I am prepared to do that. Whatever the
19 Court prefers. I am prepared to respond to the written
20 arguments that I received yesterday, or I can wait until the
21 government enunciates them, I mean which is my guess that they
22 will do at the podium.

23 THE COURT: Well, I will hear from the government
24 at this time, since then you would have not only the written
25 arguments but what they presented today.

1 So, Mr. Valkovci.

2 MR. VALKOVCI, JR.: Your Honor, to support the
3 government's position we would call United States Probation
4 Officer Peter Gawlinski to the stand.

5 (The witness was placed under oath by Courtroom
6 Deputy Gorgone.)

7 PETER GAWLINSKI, GOVERNMENT'S WITNESS, SWORN

8 DIRECT EXAMINATION

9 BY MR. VALKOVCI, JR.:

10 Q. Sir, just so we have a complete record, could you please
11 tell the court reporter your name and spell your last name.

12 A. Peter Gawlinski. It's G-A-W-L-I-N-S-K-I.

13 Q. And you're employed by the United States Probation
14 Office?

15 A. I am.

16 Q. In the Western District of Pennsylvania?

17 A. Yes. I'm located in the Pittsburgh office.

18 Q. Do you have any specific role or job within the United
19 States probation office?

20 A. Specifically, I'm what's considered a cyber crime
21 specialist. And within that capacity and that role, my
22 caseload is specifically dealing with sexual offenders.

23 Q. So you're familiar then with the supervision of sex
24 offenders?

25 A. I am.

1 Q. Could you please explain what programs or what treatments
2 are available to sex offenders within this district.

3 A. Within this district we have, I believe, seven contracted
4 sex offender-specific treatment providers. Within those
5 providers there's different modality, which each provider
6 would use in providing that treatment.

7 But, consistently, the construct of the program would
8 generally be individual therapy, group therapy, polygraph
9 examinations, and there's a number of evaluation tools that
10 they would use at the onset of treatment, and then
11 periodically through treatment.

12 Q. When you say "periodically through treatment," how long
13 does treatment last?

14 A. Treatment can -- it's not a set time for a sexual-based
15 offense, because the offense and the behavior is generally
16 ongoing and pervasive in the defendant's life. So there is no
17 set time. There is no -- there's no time set at the outset of
18 treatment. So it could last a year. It could last six
19 months. It could go on indefinitely through the period of
20 supervision.

21 Q. Now, as part of his supervision through the U.S.
22 Probation Office, did Mr. Brothers participate in any type of
23 therapy with one of these contract providers that you referred
24 to earlier?

25 A. He did. When Mr. Brothers was released in August of

1 2012, I assumed supervision of his case. He was referred to a
2 program based in Clearfield, Pennsylvania, called Project
3 Point of Light, and he participated with that program until
4 his discharge in June of 2013.

5 Q. I'm going to show you what I've marked as Government
6 Exhibit Number 1 for identification purposes. Do you
7 recognize that?

8 A. I do.

9 Q. Could you tell the Court what that is, please.

10 A. That's a letter from Project Point of Light addressed to
11 me. Specifically that is referencing Mr. Brothers, that he
12 has successfully completed the four phases of treatment within
13 Project Point of Light's program.

14 Project Point of Light specifically is one of our vendors
15 that uses a phase system, where they have a structured program
16 that they want certain things to be accomplished, and they
17 break them down into phase one through four.

18 Q. So there are four phases within that treatment regimen?

19 A. Yes.

20 Q. And did Mr. Brothers complete all four phases?

21 A. To my knowledge, yes.

22 Q. And the letter that I've given you and identified as
23 Government Exhibit 1, did you receive that from Project Point
24 of Light?

25 A. I did.

1 Q. When did you receive that?

2 A. From the date stamp, it appears July 24th, 2013.

3 MR. VALKOVCI, JR.: Your Honor, I move for the
4 admission of Government Exhibit 1.

5 MR. BROWN: No objection.

6 THE COURT: One is admitted without objection.

7 BY MR. VALKOVCI, JR.:

8 Q. And Government Exhibit 1, who sent that to you?

9 A. Project Point of Light. Specifically Patricia Clouser.
10 She is the licensed social worker that worked with
11 Mr. Brothers.

12 Q. And what does the letter say?

13 A. Do you want me to read the entirety or --

14 Q. No. Was there a portion that talks about his discharge
15 from the Point of Light program?

16 A. The first paragraph says that "Please be advised that
17 Mr. Brothers has successfully completed the four phases of
18 treatment of the Project Point of Light sex offender program."

19 It goes on to say that he's recommended that he continue
20 with counseling with a clinician equipped to help him cope
21 with underlying behavioral health concerns. It continues to
22 report that he continues to have a rigid thinking pattern, in
23 particular regarding issues that involve sex and sexual
24 behavior, and he has a tendency to intellectualize. He
25 refused to include his family in the treatment process.

1 It goes on to say that he's agreed to continue treatment
2 with his current therapist, whom he reported seeing on a
3 biweekly basis.

4 Q. So even though he completed the four phases within
5 Project Point of Light, they're recommending further
6 treatment?

7 A. They are, yes.

8 Q. I'm also going to show you what I've marked as Government
9 Exhibit 2 for identification. Do you recognize that?

10 A. I do.

11 Q. Can you tell the Court what that is, please.

12 A. It's a probation form 46, which simply is a monthly
13 treatment report provided from our vendor, Project Point of
14 Light, referencing Mr. Brothers. And we receive these on each
15 of our cases that's in treatment. It kind of apprises of the
16 progress or lack of progress.

17 But this one in particular is from July of 2013, and says
18 that Mr. Brothers is discharged, but continued mental health
19 treatment is recommended.

20 MR. VALKOVCI, JR.: Your Honor, I would move for
21 the admission of Government Exhibit 2.

22 MR. BROWN: No objection.

23 THE COURT: Two is admitted without objection.

24 BY MR. VALKOVCI, JR.:

25 Q. So Mr. Brothers was released by Project Point of Light

1 from their four-phase program, right?

2 A. Yes, he was.

3 Q. As his probation officer, did you ever release him from
4 any treatment program?

5 A. No, I did not. And maybe I should clarify. He was not
6 recommended by the provider to continue with ongoing treatment
7 at their facility, but in no way did I feel that he was
8 completed with sex offender treatment or mental health
9 treatment. He continued to see, I believe, Dr. Thompson on
10 his own.

11 Q. If you could please pull up the screen that's to your
12 left. This is the same document that I believe Mr. Brown had
13 up earlier, and I draw your attention to this paragraph here
14 because this is the one that's in question today. And it
15 states that "defendant shall participate in a mental health
16 and/or a sex offender treatment program."

17 So there's two things. He's required to participate in
18 mental health and sex offender, or mental health or sex
19 offender.

20 In Mr. Brothers' case which is it, "and" or "or"?

21 A. I would say that he completed -- or participated in both.
22 Throughout the course of my supervision with Mr. Brothers he
23 was attending Project Point of Light, and he was seeing
24 Dr. Thompson, as well as some faith-based groups as well.

25 Q. Because he was released by Project Point of Light did you

1 close him out as a supervisee?

2 A. No, we do not.

3 Q. Why don't you?

4 A. Because we keep the contract open because, number one, we
5 continue to have maintenance polygraphs once they're completed
6 with the phase work. But, additionally, we keep that program
7 open because he may need to go back into treatment.

8 Like I said before, the treatment -- they may have
9 completed or attained some goals that were met or sought in
10 the group in individual sessions, but over the course of time
11 the probation officer may see something that indicates that an
12 offender is having a difficult time, or there may be some
13 things going on that we feel may require him to go back into
14 treatment. So we do not close them out.

15 Q. When you said you "keep the contract open," does that
16 mean the contract with Project Point of Light remains open?

17 A. Yes.

18 Q. Okay. Now, from a risk of assessment standpoint from the
19 supervising probation officer, tell the Court what changes
20 because he completed Project Point of Light.

21 A. Generally, nothing. As far as our risk assessment, we
22 have a standardized risk assessment tool that for sex
23 offenders we do every six months. His completion with
24 treatment doesn't change that risk assessment score.

25 Additionally, whether he scores out -- wherever he falls

1 into that range, we continue to supervise sex offenders as a
2 high-risk case, and that doesn't change whether they've
3 completed sex offender treatment or not.

4 Q. So what you're saying is then that the level of
5 supervision or his supervision level hasn't changed either
6 because he completed Project Point of Light.

7 A. Not at all. They still remain a high case.

8 Q. The treatment of a sex offender with the probation
9 office, does it just involve you as his probation officer?

10 A. No. The way that the national level and the way that
11 it's recommended -- I believe the term that's in vogue now is
12 "best practices" -- generally involves what they call a
13 containment model. And within that containment model is --
14 it's a triangulation between the probation officer, the
15 treatment provider or clinician, and a polygrapher.

16 And if you were to diagram it out on a sheet of paper,
17 the defendant would be in the middle, with the three sides,
18 you know, representing those other entities. Without the
19 three sides you basically -- if you think of it as a table,
20 you're knocking one of the legs out. And without all three of
21 the legs, the table's going to fall down.

22 So, you know, what we generally do is I would see
23 Mr. Brothers, or any other sex offender, regularly at their
24 home, at their employment, in the community. I would confer
25 with the treatment provider. They would talk to me about what

1 is going on, in their opinion, what, you know, what
2 Mr. Brothers, for example, would be saying to them. We would
3 kind of compare notes, go back and forth to see if things are
4 meshing. You know, I would address any concerns, something
5 maybe I saw at his house. She would address with me something
6 that maybe he was saying in treatment.

7 And then periodically a polygrapher would become involved
8 to see what he's telling me, what he's telling the clinician
9 is really true.

10 Q. So as his supervising probation officer then, have you
11 recorded him as having satisfied this condition of supervision
12 that he should participate in a mental health and/or sex
13 offender treatment program?

14 A. Have I reported it to the Court?

15 Q. Yes.

16 A. No.

17 Q. In your supervision of him, has he satisfied that
18 condition?

19 A. He's completed the phase work but he's not -- in my
20 opinion, he's not done with treatment or he's not -- he's not
21 finished being a sex offender case. It remains at large until
22 the time that he's done with supervision.

23 MR. VALKOVCI, JR.: Your Honor, I have no further
24 questions at this time.

25 THE COURT: Attorney Brown.

CROSS-EXAMINATION

BY MR. BROWN:

Q. Good afternoon, sir.

A. Good afternoon.

Q. You're a probation officer at the United States Probation Office for the Western District of Pennsylvania, correct?

A. Yes.

Q. And your job is a PO, right?

A. Yes, it is.

Q. You're not a board certified sex offender treatment provider; am I correct?

A. No, I'm not.

Q. Would it be fair to say that a main portion of your role as a probation officer is to enforce conditions that a judge imposes?

A. Yes, it is. As well as the protection of the public.

Q. And one of the conditions that has -- or the condition that is the source of some questioning is this "sex offender and/or mental health treatment" condition, right?

A. I understand that to be why we're here today, yes.

Q. So we're clear; Mr. Brothers is currently in mental health care, right?

A. I'm not supervising Mr. Brothers at this time so I can't answer that, but it is my understanding that he is.

Q. Project Point of Light is one of your seven treatment

1 providers in the Western District.

2 A. Yes, it is. It's the closest one geographically to
3 Mr. Brothers' home.

4 Q. And are they a board certified sex offender treatment
5 provider?

6 A. To my knowledge, yes.

7 Q. The United States Probation Office for the Western
8 District of Pennsylvania is not a board certified sex offender
9 treatment program. Am I right?

10 A. No, we do not provide treatment services.

11 Q. Okay. You mentioned that Mr. Brothers, in your opinion,
12 was not discharged, and that he would be part of a sex
13 offender treatment program throughout the 15 years of his
14 supervision.

15 Did I capture that correctly?

16 A. Essentially, yes. That he may not be going to a location
17 on a weekly basis for treatment at any given time, but at any
18 point should we see something that needs to be addressed we
19 would contract that or refer him back to one of our providers.

20 Q. So an analogy can be made to someone who has drug
21 treatment conditions, can it not, where they participate in
22 either inpatient or outpatient treatment, are discharged, but
23 because the condition exists you leave that option open in
24 case they have a relapse. Am I right?

25 A. That would be a good analogy.

1 Q. So do you know right now if Mr. Brothers is participating
2 in one of your seven treatment programs in the Western
3 District of Pennsylvania?

4 A. To my knowledge, his last treatment was at Project Point
5 of Light.

6 Q. And that was in July -- he was discharged from that
7 program in July of 2013, right?

8 A. I think he was -- the discharge was somewhere around
9 July, yes. July of 2013.

10 Q. Okay. Referring to Government's Exhibit 1, this letter
11 is from Patricia Clouser, who is a licensed social worker at
12 Project Point of Light. Am I right?

13 A. Yes.

14 Q. Can you tell me anywhere in this letter where it says
15 that Mr. Brothers is recommended by that treatment provider to
16 continue with polygraph exams.

17 A. No. It doesn't say anything about polygraphs.

18 Q. And in Government's Exhibit 2 there is a monthly
19 treatment report that looks like it's been signed by
20 Ms. Clouser, and above it says "Discharged, continued mental
21 health treatment recommended." Correct?

22 A. Yes.

23 Q. And, to your knowledge, is this her recommendation, or
24 Project Point of Light's recommendation?

25 A. I believe it is.

1 Q. And anywhere in that box does it say continued polygraphs
2 recommended?

3 A. No, it does not.

4 Q. All right. Now, it does recommend continued mental
5 health counseling, right?

6 A. It does.

7 Q. And you made a distinction, when you were asked some
8 questions by Mr. Valkovci, between mental health treatment and
9 sex offender treatment. Right?

10 A. I'm not sure exactly what you mean -- referring to but --

11 Q. I'm sorry. Let me refer to the Court-ordered conditions
12 here. You'll agree with me, will you not, that it says "The
13 defendant shall participate in a mental health and/or sex
14 offender treatment program." Right?

15 A. Yes.

16 Q. So it has "mental health program and/or sex offender
17 treatment program." Right?

18 A. Uh-huh.

19 Q. So as a probation officer enforcing that condition, would
20 you consider that to be two separate options for you as a PO
21 for your supervising defendant? You can send them to mental
22 health treatment or sex offender treatment?

23 A. I would read that that I could send him to mental health
24 or sex offender treatment or mental health and sex offender
25 treatment.

1 Q. Exactly. So two separate entities. You have mental
2 health treatment providers that don't provide sex offender
3 treatment. Am I right?

4 A. We do.

5 Q. And you have sex offender treatment that necessarily
6 includes mental health treatment, but it doesn't include
7 mental health treatment outside the sex offender context,
8 right?

9 A. Could you repeat that.

10 Q. Sorry. Sometimes I do that.

11 In a sex offender treatment program, is it your
12 understanding the seven treatment providers that your office
13 contracts with, they all provide sex offender treatment which
14 may necessarily include mental health treatment, but they
15 don't just provide mental health treatment for people who are
16 non-sex offenders?

17 A. I don't know for certain that that is true, but all of
18 our contract providers do provide both services.

19 Q. Okay. My point is, you have two options as a probation
20 officer -- maybe three options: Mental health treatment,
21 option one; sex offender treatment, option two; and mental
22 health and sex offender treatment. Right?

23 A. I would agree with that. Part of the reason is some
24 providers don't specifically consider themselves "sex offender
25 treatment." They may have a contract to provide mental health

1 treatment, but it would have to -- for us to send a sex
2 offender there, they would be providing sex offender
3 treatment.

4 Q. My next question is, you said that when Mr. Brothers
5 finished the board certified sex offender treatment program --
6 the four phases I think you called it, Project Point of
7 Light -- and they send you and Mr. Brothers a piece of paper
8 saying he successfully completed, no further treatment needed,
9 you said "I did not release him from the program" or something
10 to that effect. Am I right?

11 A. You're right.

12 Q. Okay. So the board certified sex offender treatment
13 provider said he was done, and your office is saying he's not
14 done?

15 MR. VALKOVCI, JR.: Objection, Your Honor. I think
16 counsel's mischaracterizing what that letter is. They're not
17 saying "he's done." What the letter says specifically is he's
18 completed the four phases of their treatment regimen. That's
19 what it says, not that he's done. I think that's
20 oversimplifying this.

21 THE COURT: Well, rather than rule on that
22 directly, I will ask the witness to describe for the Court his
23 interpretation of what that letter meant and how he responded
24 to it in his supervision.

25 Go ahead, sir.

1 THE WITNESS: What this letter means to me is that
2 at this time Mr. Brothers wouldn't be subject to going to
3 weekly or biweekly counseling sessions at Project Point of
4 Light. Our contract would remain open to provide services,
5 should they become necessary again, and also to provide
6 polygraph services at the appropriate times.

7 Now, the way that we operate is that once they're
8 done with the phase work and they're no longer going to
9 counseling on a scheduled basis, we would have the provider
10 perform maintenance polygraph examinations. And they're
11 designed to monitor compliance with the conditions of their
12 release.

13 For sex offenders specifically, many times those
14 questions may have to do with sexual behaviors or things of
15 that nature. Also, were they accessing unmonitored computers
16 or unmonitored cell phones or having communications or contact
17 with minors. That's not something that the probation officer
18 would either be aware of or feel was appropriate.

19 THE COURT: Let me ask you this then; there seems
20 to be a difference of interpretation between counsel: Was the
21 Project Point of Light sex offender treatment program the sex
22 offender treatment program that is in the conditions, in your
23 mind, or is it part of a treatment program? Because I am not
24 quite sure how you view this.

25 THE WITNESS: Do I feel that the provider?

1 THE COURT: The program he went through at Project
2 Point of Light, was that the sex offender treatment program
3 that is referenced in the conditions of supervised release, or
4 is it part of a larger overall program? I would just like to
5 know what your approach to that is.

6 THE WITNESS: My approach is that it's a
7 collaborative effort. The contract provider's providing the
8 services that we're not licensed or we're not the
9 professionals to do. But the program as a whole --

10 THE COURT: When you say "program," tell me what
11 you mean by "program."

12 THE WITNESS: For me, managing sex offenders is a
13 larger-than-one-person endeavor. And as far as my view is the
14 program itself involves the three people or three entities
15 that I described earlier in that containment model. It's the
16 probation officer, it's the treatment provider, and the
17 polygrapher working in concert to try and manage risk and
18 rehabilitate within the community.

19 Now, that Project Point of Light is somewhat
20 removed at that point when he's no longer going to do an
21 individual or a group session. That's where the -- where I
22 need to rely on the polygrapher to assist in monitoring the
23 compliance. It would be impossible for me to monitor -- I
24 have a caseload of 45, 45 people over eight counties, 24 hours
25 a day.

1 So the program itself, to answer your question,
2 Your Honor, I look at the treatment provider as one part of a
3 larger program.

4 THE COURT: I think I understand.

5 Mr. Brown, go ahead.

6 BY MR. BROWN:

7 Q. So I understand that what you're saying is a program in
8 your eyes, are you aware if that is your office's position?

9 A. Can I speak for the chief at this point, I don't believe
10 I can. But that is the way that I've been doing business for
11 a number of years.

12 Q. Well, let me ask you this: Is there a definition that
13 your office has of "sex offender treatment program"? Because
14 I think maybe where some of the dispute lies is one person may
15 view sex offender treatment program as Project Point of Light,
16 whereby your definition, sex offender treatment program is
17 supervised release for a sex offender.

18 And so is there a policy or a definition that you have as
19 a PO that says this is what a sex offender treatment program
20 is?

21 A. I believe as far as maybe our contract there would be a
22 definition of what we would find to be an acceptable treatment
23 provider or treatment program. I don't know of any specific
24 language or policy statement that would reference what a
25 program is.

1 Q. Given your interpretation of what a sex offender
2 treatment program is -- well, let me back up.

3 This sex offender treatment program condition is a
4 boilerplate condition that is included in every single
5 possession of child pornography case. Am I right?

6 A. I would say 97 percent, yes. There are some cases that
7 it may not be imposed at the onset, but our office would
8 likely pursue a modification to include that.

9 Q. Okay. And you'll agree with me that treatment conditions
10 for convicted sex offenders is an evolving science. Am I
11 right?

12 A. It's always evolving, yes.

13 Q. That many of these conditions that are here weren't here
14 ten years ago?

15 A. I've been with the agency for eight years, so I can't say
16 what was here ten years ago. But in my time they have been
17 updated.

18 Q. And often your office will ask a person convicted in
19 these circumstances, who does not have some of these
20 conditions, to agree with a modification to some of these
21 conditions. Am I right?

22 A. That's correct.

23 Q. Now, you'll agree with me that this condition itself does
24 not say explicitly that periodic polygraph exams are permitted
25 as a condition?

1 Would it be easier if you saw a hard copy?

2 A. No, I can read it.

3 It does not say "periodic," no.

4 Q. Given that someone, under your definition of what sex
5 offender treatment program is, if they have a 15-year period
6 of supervised release, and you're saying that sex offender
7 treatment program is the period of supervised release, then
8 they are in a sex offender treatment program for the entire
9 period of supervised release. Am I right?

10 A. We would have a contract open with a provider likely for
11 the entire period of the supervised release, if so far as only
12 to provide polygraph services.

13 Q. And you said that that's because -- or maybe in part
14 because supervising sex offenders that they're at high risk,
15 right?

16 A. Yes.

17 Q. And that's all sex offenders?

18 A. I believe --

19 Q. Or --

20 A. As far as our classification, yes, high risk.

21 Q. Let's talk about Mr. Brothers.

22 Do you have a score of how high risk he is?

23 A. I don't have that information in front of me.

24 Q. What do you use, a Static-99?

25 A. Well, because Mr. Brothers' offense wasn't a hands-on

1 offense, a Static-99 I don't believe would apply.

2 Q. Now, you call these maintenance polygraphs, right?

3 A. Yes. Maintenance and/or monitoring.

4 Q. I understand the term of art, but you would agree with me
5 again that the idea or concept of maintenance polygraphs is
6 not explicitly spelled out in that condition. Am I right?

7 A. No, it's not. It's a more broad generalization to submit
8 to polygraph tests.

9 Q. And are maintenance polygraphs something that are done in
10 every single sex offender case once someone is discharged from
11 a sex offender treatment -- one of the seven sex offender
12 treatment programs?

13 A. Are they done on every case? They should be, yes.

14 Q. They should be. In your probation officer opinion, do
15 you know if they are?

16 A. I can't say that they are, because I don't have all of
17 the sex offender cases. It is our policy that sex offender
18 cases should be subjected to maintenance or monitoring
19 polygraphs annually.

20 Q. You talked about the treatment model; probation officer,
21 clinician, and polygrapher. Where did you learn about that
22 treatment model?

23 A. That's been -- I've been supervising sex offenders for
24 probably three and a half years with the federal system, and
25 as a county probation officer throughout the eight years I was

1 there. That's always been a model that we've used. I've
2 heard about it at national trainings, local trainings.

3 Q. I'm not trying to put you on the spot, but I assume you
4 don't have at your disposal the empirical evidence that this
5 is the treatment model in these instances?

6 A. No, I do not.

7 Q. This is just how you do it?

8 A. This is how I was taught to do it, and how we have
9 operated.

10 Q. And, again, this treatment model is one that's applied to
11 all sex offender cases?

12 A. Generally, yes.

13 Q. So it's not particular to an individual? Like it's not
14 particular to Mr. Brothers, but not at the exclusion of some
15 of the sex offenders, but it's all sex offenders?

16 A. That's the policy, yes.

17 MR. BROWN: Your Honor, may I take a minute to look
18 at my computer and see if there are any other questions I need
19 to ask?

20 THE COURT: Yes.

21 MR. BROWN: Your Honor, I don't think I have any
22 other questions at this time.

23 THE COURT: All right. Thank you.

24 Mr. Valkovci, redirect.

25 MR. VALKOVCI, JR.: No, Your Honor. Thank you.

1 THE COURT: All right, you can step down, sir.

2 MR. VALKOVCI, JR.: Your Honor, I have no
3 additional evidence to present to the Court, just argument.

4 THE COURT: All right. Mr. Brown, are you going to
5 present any witnesses?

6 MR. BROWN: No, sir.

7 THE COURT: Then we will hear argument then.

8 MR. VALKOVCI, JR.: Your Honor, as I stated in my
9 brief, and the government would incorporate by reference the
10 brief it filed with this Court in response to Mr. Brothers'
11 motion to clarify, regardless of how Mr. Brothers chooses to
12 define the term "program," regardless of how the government
13 chooses to define the term "program," one thing remains clear:
14 There is no dispute as to the phrase "until such time as the
15 defendant is released from the program by the Court."

16 As Mr. Gawlinski testified, as an arm of the Court,
17 he has not released Mr. Brothers from any program, whether you
18 want to define it as mental health and sex offender, whether
19 you want to define it as mental health or sex offender,
20 whether you want to define the program as Project Point of
21 Light, or whether you want to define the program as the
22 15-years term of supervision, it's moot. Because until such
23 time as this Court releases him from that program, regardless
24 of how it's defined, these conditions apply. Period. That
25 should be the end of the discussion here.

1 But we're going to deal with a tortured
2 interpretation of the term program, that it's limited to a few
3 sessions at Project Point of Light, and that if for some
4 reason -- or when he is released from that program, then all
5 the conditions cease to exist.

6 Your Honor, as set forth in the government's brief
7 as an additional argument, we have Standard Condition Number
8 4. Standard Condition Number 4 that was imposed on
9 Mr. Brothers requires him -- and I have it here -- "he shall
10 answer truthfully all inquiries by the probation officer and
11 follow the instructions of the probation officer." It's on
12 page 5 of 6 of the judgment order. He was instructed to
13 submit to polygraph testing. Standard Condition Number 4
14 clearly contemplates that.

15 There would never be a dispute if a probation
16 officer ordered a supervisee or a probation officer to submit
17 W-2 forms, or bank statements, or income tax returns, or a
18 letter from an employer to document certain things that are
19 supposed to be happening. It's a way that you monitor them,
20 because they're reasonably related to why there is
21 supervision.

22 Now, of course, the order, the directive has to be
23 reasonably related to why they're being supervised. If a
24 probation officer would go to a supervisee and say, "I'm
25 ordering you to go buy a navy blue suit," of course that

1 wouldn't be applicable. But in a situation like this, it
2 gives the probation officer, as an arm of the Court, the
3 authority to do what is necessary to see that all the
4 conditions of supervision are being complied with.

5 It's a second reason why the Court should uphold
6 it, because we don't even need to get to the condition with
7 respect to program, Your Honor, because under Standard
8 Condition Number 4 the probation officer has authority to
9 request this.

10 Is a polygraph reasonably related to sex offender
11 treatment, to sex offender supervision? The Third Circuit has
12 repeatedly recognized that, and those cases are set forth in
13 the government's brief. It's an important tool. It's a vital
14 tool to be used by probation officers when supervising sex
15 offenders.

16 Then we go down, as another basis for the
17 government's position we look at the additional conditions of
18 supervision imposed by the Court. Mr. Brothers is not
19 permitted to use a computer or electronic device to access
20 child pornography or communicate with any individual or group
21 for the purpose of promoting sexual relations with children.

22 Mr. Brothers is not to possess or access with the
23 intent to view any materials, including pictures, photos,
24 books, writings, drawings, videos, or video games depicting
25 and/or describing child pornography.

1 He is not permitted to associate with children
2 under the age of 18. He is required to consent to the
3 installation of software or hardware to monitor his computers
4 and electronic devices. And as quoted from the judgment
5 order, "To confirm the defendant's compliance with this
6 condition."

7 He is also required to consent to periodic
8 unannounced examinations of his computers and electronic
9 devices by probation officers. Again to quote the judgment
10 order, "To confirm the defendant's compliance with this
11 condition."

12 He is required to notify his employer of the nature
13 of his conviction. If his employment requires the use of a
14 computer and, correspondingly, the probation officer is
15 directed by this Court to -- again quoting the judgment order
16 -- "confirm the defendant's compliance with this notification
17 requirement. And he is required to provide the probation
18 office with accurate information about his entire computer
19 system and electronic devices, to include the name of his
20 internet service provider and all passwords used.

21 If we extrapolate Mr. Brothers' argument that he's
22 completed Project Point of Light and, therefore, the program
23 is over, does that mean, Your Honor, that he is now then
24 permitted to possess or access with intent to view child
25 pornography? Does that mean that he can now use a computer or

1 electronic device to access child pornography? Does that mean
2 because he completed that program that he can associate with
3 children under the age of 18? Can he refuse to consent to
4 have the installation of software or hardware on his
5 computers, since he's already completed the program? Can he
6 refuse to periodic unannounced searches of his computers and
7 electronic devices? Is he relieved of the obligation to
8 provide truthful information to his probation officer?

9 I submit the answer to every one of those
10 questions, Your Honor, is clearly no. But why is it no?
11 Because the program is ongoing. These conditions, in the
12 broadest possible sense, are designed to ensure compliance, to
13 protect society from Mr. Brothers. This Court imposed a term
14 of supervision of 15 years because at that moment the Court
15 felt that was what was appropriate. Not more than necessary,
16 but appropriate.

17 Mr. Brothers ignores Standard Condition Number 4.
18 Mr. Brothers ignores all these other conditions and focuses on
19 one only. Unfortunately, he doesn't even focus on the entire
20 thing, Your Honor. He parses the language and employs a very
21 myopic definition of the term "program." He ignores the term
22 "until released by the Court." Again that phrase, Your Honor,
23 settles the issue.

24 He has not been released. Therefore, he is still
25 subject to the terms of the program, regardless of how it's

1 defined, including polygraph testing.

2 Furthermore, Your Honor, when we look at how the
3 polygraph language is used, Mr. Brown asked on
4 cross-examination whether it said specifically random
5 polygraphs or maintenance polygraphs. No, it doesn't say
6 that, Your Honor. But the Supreme Court just last week in an
7 interesting decision -- the facts are more interesting than
8 the plurality decision in the case, Your Honor, because it
9 dealt with whether or not an undersized red grouper is a
10 tangible object. So it's kind of a whimsical type opinion.
11 I'm not citing it for the premise that an undersized grouper
12 is not a tangible object, Your Honor. What I'm citing that
13 for in the part of the plurality opinion in *Yates* -- and the
14 citation is set forth in the government's brief -- is that we
15 have to look at not only the word itself or the definition, we
16 have to look at the context in which the word is used. The
17 specific context, and then also the broader context.

18 So we have a three phase here. We look at the
19 definition, then we look at the context in which it was used.
20 Many, many years ago -- or I'll say decades, Your Honor, I'll
21 admit it -- decades ago when I was in law school I remember
22 that old Latin phrase -- I don't want to mispronounce it, but
23 what it actually means is, a word is known by the company it
24 keeps. That's exactly what the Supreme Court recognized in
25 *Yates*.

1 If we take a look at the definition of "programs"
2 as cited in the government's brief, Webster's Ninth New
3 Collegiate Dictionary says it's a plan or a system under which
4 action may be taken toward a goal, a curriculum. It's broad.

5 The plan or system under which Mr. Brothers must
6 take action toward a goal is his period of supervision. The
7 goal is to complete the period of supervision. That's the
8 plain meaning of the word "program," Your Honor.

9 Mr. Brothers, in essence, is coming before the
10 Court and trying to -- attempting desperately -- to inject
11 ambiguity where none exists. It's plain.

12 But let's go to step two. Under *Yates* it tells us
13 that we are to look at the specific context in which it was
14 used. The specific context, Your Honor, states that "the
15 defendant shall abide by all program rules, requirements, and
16 conditions of the sex offender treatment program, including
17 submissions to polygraph testing, to determine if he is in
18 compliance with the conditions of release."

19 Not to determine if he is in compliance with the
20 conditions of the sex offender treatment program. Not to
21 determine if he is in compliance with the four stages, or four
22 phases, of Project Point of Light, but to determine if he is
23 in compliance with the conditions of release. Which include
24 the standard conditions, which include all the additional
25 conditions imposed by the Court.

1 If we were to accept Mr. Brothers' myopic view of
2 the term "program," it would render that phrase superfluous.
3 The Supreme Court and many other courts, Your Honor, have
4 recognized that you should not interpret any type of statute
5 for language, if that interpretation would render superfluous
6 something else. It would mean that language is meaningless
7 then, Your Honor. The language that reads "To determine if he
8 is in compliance with the conditions of release" becomes
9 meaningless. It has no import whatsoever. So to apply that
10 kind of a tortured construction of the term "program" that
11 would in essence render moot, render surplusage, should not be
12 accepted or countenanced by this Court.

13 "To determine if he is in compliance with the
14 conditions of release." To determine, Your Honor, in essence,
15 whether he has access to or possessed child pornography.
16 That's a condition of release. To determine whether he has
17 had contact with a child under the age of 18 years. That's a
18 condition of release. To determine whether he has answered
19 truthfully all inquiries and provided truthful information to
20 his probation officer. That's a condition of release. That's
21 what that is designed to do in its plain meaning and in its
22 specific context.

23 Let's look at the broader context though, Your
24 Honor, of all the conditions of supervision. Let's ask
25 ourselves, Why did the Court impose all of these conditions?

1 Why did the Court choose 15 years? Because they are necessary
2 to supervise Mr. Brothers.

3 Your Honor, it's interesting, because it's not just
4 the Court's position on this. The Court was here at
5 Mr. Brothers' sentencing when Mr. Brothers called as their
6 expert witness Dr. Pass. I have a copy of the transcript of
7 Dr. Pass's testimony. One of the questions asked by
8 Mr. Gerson, who was Mr. Brothers' attorney during the
9 sentencing hearing, Mr. Gerson says "Finally, Doctor, do you
10 have an opinion as to Brandon's risk for sexual offense
11 relapse moving forward?"

12 Doctor said Yes.

13 Mr. Gerson said "And moving forward, are you
14 indicating to the Court that relapse risk is low" -- and this
15 is the important part -- "provided that he maintain some type
16 of maintenance program on the structured, not necessarily with
17 you, but with someone who can maintain a long-term structured
18 sex offender treatment that you spoke of?"

19 And the answer by Dr. Pass was Yes.

20 As Dr. Pass went on to testify under oath, "So in
21 order to maintain that low risk level, compliance on a regular
22 maintenance program, a structured sex offender treatment,
23 would be required. It would be a management issue.
24 Paraphilia is a disorder that is not cured, it's managed. And
25 Mr. Brothers will need to manage that part of his sexuality in

1 a healthy way."

2 That's why the conditions of supervised release
3 were imposed by this Court. That's why he's on a period of
4 supervision of 15 years.

5 In the broader context, Your Honor, the conditions
6 imposed by the Court, including the installation of software
7 for the reason as stated in the order, "To confirm his
8 compliance with this condition."

9 A condition was that he consent to periodic
10 unannounced searches. Again, the reason was very clearly set
11 forth by the Court, "To confirm the defendant's compliance
12 with this condition."

13 To notify his employer. And then the probation
14 officer was directed by the Court to go confirm with the
15 employer that he'd actually done that.

16 As we go through it, Your Honor, the fundamental
17 objective of this supervision is for the probation officer to
18 ensure Mr. Brothers is compliant with the conditions of his
19 release. To interpret the polygraph testing language in this
20 broader context, Your Honor, clearly demonstrates its
21 application throughout the entire term of supervision.

22 If we were to accept Mr. Brothers' definition or
23 interpretation of the word "program," Your Honor, we would
24 have to ask, Your Honor, why then would the Court impose these
25 other conditions?

1 Without polygraph testing, Your Honor, there is no
2 way to ensure Mr. Brothers' compliance with fundamental
3 conditions of his release. And as I argue in my brief, Your
4 Honor, it would be incongruent for this Court to impose these
5 conditions and then deprive the probation officer of the very
6 means by which they need to confirm compliance with those
7 conditions. The Court should not accept that kind of a
8 tortured interpretation of the word "program." It should not
9 be so limited, Your Honor.

10 Your Honor, in sum, the condition that he comply
11 with polygraph testing is rooted in Standard Condition Number
12 4. To the extent we look at the language and the additional
13 condition that's put up on the overhead projector right now,
14 Your Honor, the plain meaning of the word "program" is clear.
15 The specific context in which that word is used, because it
16 references to determine if he is in compliance with the
17 conditions of release, is clear. And the broader context of
18 that provision with all the other provisions of supervision is
19 clear.

20 "Program" means the entire period of supervision.
21 There are different phases and facets to the program. Some of
22 those phases and facets, Your Honor, may require Mr. Brothers
23 to seek inpatient treatment, to seek further counseling. It's
24 an ongoing process. It's an ongoing program. It doesn't
25 simply end because he was discharged from the four-phase

1 program or the four-phase treatment regimen at Project Point
2 of Light.

3 But at the end of the day, Your Honor, regardless
4 of how Mr. Brothers chooses to define it, he has not been
5 released by the Court.

6 Thank you.

7 THE COURT: Attorney Brown.

8 MR. BROWN: Your Honor, before I make argument,
9 there has been at least -- the government's alluded to the
10 fact that Mr. Brothers is either not complying with probation
11 or -- we come to the Court in a non-confrontational posture,
12 asking the Court to define or to tell us what it meant,
13 because I think the Court can see why one person may view what
14 this paragraph means differently than another. And the bottom
15 line is it's what did the Court intend.

16 Mr. Brothers has, as far as I know, been absolutely
17 totally compliant on supervision. Had he not been, I'm sure
18 that he would be here with different evidence being presented.
19 He is not here to inject ambiguity where none exists. The
20 condition, frankly, I think the Court can read, it's very
21 clear in that the word "program" is not a word that's taken in
22 isolation. It's part of a series of words, "sex offender
23 treatment program." And given the fact that it's connected
24 with those words, it takes on a different meaning than the
25 word "program" by itself.

1 If the Court looks at it, and it says "The
2 defendant shall participate in a mental health and/or sex
3 offender treatment program approved by the probation officer."
4 That suggests an outside entity. The probation officer's
5 testified he's not board certified nor is his office a board
6 certified sex offender treatment program. So they necessarily
7 have to approve -- he said they have seven programs in the
8 Western District that they approved for the treatment of
9 persons who are sex offenders. That is what a sex offender
10 treatment program is, not supervised release.

11 You know, the Federal Judicial Center defines what
12 supervised release is, and it says "Supervised release is a
13 criminal sentence in which the offender is placed under court
14 supervision for a specified period of time, but is allowed to
15 remain in the community.

16 "Like offenders placed on probation, offenders
17 placed on supervised release are supervised by probation
18 officers and are required to observe certain conditions of
19 release."

20 Conditions imposed by this Court. One of those
21 conditions being "participate in a sex offender treatment
22 program." Mr. Brothers participated in not one, but two. If
23 the Court recalls, the government has presented information
24 from the sentencing hearing. He participated in a sex
25 offender treatment program through Dr. Alan Pass. If the

1 government has no objection, I would move for the admission of
2 the transcript as Defendant's Exhibit C. If the Court wants
3 to refer to it and refresh its memory from Dr. Pass's
4 testimony, I'd be happy for the Court to see what he had to
5 say about Mr. Brothers.

6 THE COURT: I don't think that will be necessary.

7 MR. BROWN: Okay. Well, Your Honor, Dr. Pass said
8 that he participated in his program and he was successful.
9 The government referred to the transcript, and I will as well,
10 that Dr. Pass said that he -- according to his testing models,
11 I believe it was either a .07 or .7 risk of recidivism over a
12 15-year period. And he did say that he should have
13 maintenance.

14 Mr. Brothers did have maintenance. He went to
15 Project Point of Light, and then that sex offender treatment
16 provider said, as is indicated in Defendant's Exhibit B,
17 "successful completion, no further treatment needed." Now, it
18 did say though he would benefit from mental health treatment
19 separate and distinct from sex offender treatment.

20 If the Court reads its condition, it's clear that
21 polygraphs and sex offender treatment program, i.e., Project
22 Point of Light, go hand in hand. "The defendant shall abide
23 by all program rules, requirements, and conditions of the sex
24 offender treatment program."

25 Again, a program approved by the probation officer,

1 including submission of polygraph testing to determine if he's
2 in compliance. That's what that condition refers to. The
3 program refers to one of the seven treatment providers
4 approved by the probation office here in the Western District.

5 By comparison is a very popular condition that is
6 imposed by this Court -- I shouldn't say "popular," I should
7 say "common" condition -- is one for drug treatment. And the
8 Court, I'm sure, recalls that in drug treatment the Court's
9 condition of drug treatment is essentially one and the same.
10 "Drug treatment program approved by the probation officer."

11 But by stark comparison to the sex offender
12 treatment condition, that condition also says "periodic
13 testing," right. This condition, the sex offender treatment
14 condition, does not say "periodic testing."

15 The condition is one which includes polygraphs as a
16 condition of participation in a sex offender treatment
17 program, i.e., people who are board certified sex offender
18 treatment providers.

19 The government's argued that Standard Condition
20 Number 4 contemplates polygraphs. I respectfully disagree.
21 If it contemplated polygraphs, it would say "polygraphs." It
22 does not. Being truthful and following instructions of a
23 probation officer does not make the leap to polygraphs. If
24 you were to accept that interpretation, then polygraph is just
25 implicit in the entire conditions, whether they be standard or

1 additional. And I don't think that's the Court's intent, to
2 have every single supervisee subject to polygraph exams the
3 entire time that they are on supervised release. The only
4 time "polygraph" is mentioned is in this one paragraph that is
5 of some dispute. As a result, I'd ask the Court to reject
6 that argument.

7 Additionally, I'd ask the Court to take into
8 consideration there's been no evidence presented that he
9 hasn't followed instructions, that he hasn't been truthful
10 with his probation officer. Really, the testimony here has
11 been -- the testimony that was provided is really about the
12 policies and the views of the probation office, as indicated
13 by Mr. Gawlinski.

14 The government also argued, Your Honor, that the
15 Third Circuit recognized that polygraphs are a tool. That's
16 the *Lee* case from their brief. In the *Lee* case a polygraph
17 was ordered as a condition of supervision in that case. And
18 the defendant in that case made a Fifth Amendment challenge to
19 polygraphs and whether or not it violated his Fifth Amendment
20 right. And the Court said that in that context they weren't
21 going to say that it was a violation of his Fifth Amendment
22 rights, and the condition was permitted.

23 But here what I'm saying is is that the blanket
24 "you can polygraph my client any day you want" does not exist.
25 What the Court's condition says is that polygraphs are a

1 condition of him participating in a sex offender treatment
2 program. Not as defined by an individual probation officer,
3 but as defined by the Court. And that if you look at the
4 words and how they're connected, those words suggest that "sex
5 offender treatment program" means somebody who knows what
6 they're doing in the treatment of sex offenders.

7 And what's interesting is none of those folks,
8 whether it be Dr. Pass who testified, said you know what, he
9 needs to have polygraphs. None of them. They say the word
10 "maintenance," but they don't say that he needs to be
11 subjected to polygraphs. The social worker from Project Point
12 of Light doesn't say that, nor does Dr. Pass.

13 Your Honor, it is our position that the inclusion
14 of polygraphs amounts to a modification of an existing
15 condition. If the probation office finds that such a
16 condition is necessary in this case, that there are a change
17 in circumstances that under 3583 and the 3553(a) factors
18 listed in that statute somehow warrant a modification, the
19 probation office should file a request and then it can be
20 particular to this defendant.

21 I know this Court's aware that the Third Circuit
22 found that the conditions of supervision have to be reasonably
23 related to the offense and the offender. And when the Court
24 imposed this condition, it did not find that periodic
25 polygraphs was reasonably related to this particular offender.

1 If there are circumstances that have changed that
2 warrant a change, then the probation office should file a
3 modification. We talked about that, and that idea was
4 rejected because it is, as you've heard, the probation
5 office's position and interpretation of this condition that
6 the condition of polygraphs exists as-is.

7 Finally, Your Honor, the government has argued --
8 and I think a lot of this is based on the generalized fear of
9 sex offenders. The probation officer testified that, you
10 know, these conditions are ones that, you know, are imposed in
11 97 percent of sex offender cases and, you know, the terms of
12 people being released -- can't really name one who's been
13 released from the supervised release, i.e., sex offender
14 treatment program -- is on the fear of high risk of recidivism
15 by sex offenders. The Court has the sentencing transcript --
16 or has heard from Dr. Pass in the sentencing at just how low a
17 risk he is, and hasn't heard from anybody in the field of sex
18 offender treatment that suggests that polygraphs are needed as
19 "maintenance" because that's how we do things, nor does the
20 Court order it.

21 I think that the conditions have to be particular
22 to Mr. Brothers. This condition as stated suggests polygraphs
23 as a condition of sex offender treatment, and it does not say
24 anything more than that. And, therefore, we'd ask the Court
25 to determine that polygraphs, annual polygraphs, weekly

1 polygraphs, monthly polygraphs, polygraphs at-will is not what
2 the Court imposed when it imposed it.

3 That's all I have.

4 THE COURT: Mr. Valkovci, do you have any rebuttal?

5 MR. VALKOVCI, JR.: Briefly, Your Honor.

6 Your Honor, I submit that the Standard Condition
7 Number 4 does contemplate polygraphs. A polygraph is many
8 things. If you have a drug case and an incident arises that
9 would lead the probation officer to request a polygraph
10 because it dealt with certain information, certain evidence or
11 something like that, would the probation officer have the
12 ability to invoke Standard Condition Number 4? I submit he
13 would, Your Honor.

14 As recognized in the government's brief, A
15 sentencing court must use categorical terms to frame the
16 contours of supervised release conditions. It is impossible,
17 the court recognized, to expect a sentencing court, especially
18 within the context of this type of a case -- "this type of a
19 case" referenced by the court was a sex offender case. "It is
20 impossible to expect a sentencing court to fashion a condition
21 that could account for every possible potential scenario of
22 prohibition that a defendant can devise."

23 Conditions of supervised release "do not have to be
24 cast in letters six feet high, or to describe every possible
25 permutation, or spell out every last self-evident detail for

1 them to provide adequate and fair notice."

2 Counsel injected a new argument into his position a
3 few moments ago by saying that the polygraph condition doesn't
4 specifically apply to Mr. Brothers. Mr. Brothers pled guilty
5 to possession of images depicting the sexual exploitation of
6 children. His base offense level was enhanced because it was
7 determined that he had over 1500 such images. His base
8 offense level was further enhanced because the images depicted
9 prepubescent minors being raped and engaging in sexual acts.
10 His base offense level was further enhanced because it
11 depicted sadomasochistic portrayal of minors.

12 Oh, it perfectly applies to him. There's a very
13 solid basis for why we have these restrictions on him, and we
14 have to have this close supervision for 15 years, Your Honor.
15 If nothing more, it's the factors I just related to the Court.

16 Yes, Dr. Pass said he is a low risk. But again,
17 we're parsing the language. We're selectively quoting the
18 language. Dr. Pass said he is a low risk as long as he is on
19 a maintenance program. The two go hand in hand.

20 As Dr. Pass further testified when asked, well,
21 what is a maintenance program, he said, a maintenance program
22 and a safety program are a little bit different. The
23 maintenance plan is an oversight plan where the client is held
24 fully accountable. And that would be a relapse prevention
25 plan.

1 One of the things that was testified to, Dr. Pass
2 said that questions in the past have been raised about
3 utilizing polygraph testing. We do polygraph testing
4 postconviction for compliance. But he doesn't need it now
5 because he completed a few weeks of Project Point of Light?
6 His own expert at sentencing uses it for compliance to sexual
7 offender treatment.

8 He also testified, he said, "I believe the factor
9 that is most important for the Court to consider here for
10 rehabilitation" -- according to Mr. Gerson, "was the continued
11 ongoing education and rehabilitation of Mr. Brothers." That
12 didn't cease, and it won't cease and hasn't ceased just
13 because he was discharged from Project Point of Light.

14 There is no need for change. There is no need for
15 modification. There is no changed circumstances, Your Honor.
16 The meaning of the words are patent. "Program," regardless of
17 how it's defined, includes the entire period of supervision
18 because it's an ongoing treatment program. It's an ongoing
19 curriculum from which he's not been discharged.

20 Thank you.

21 THE COURT: Anything further?

22 MR. BROWN: Briefly, if the Court would permit.

23 I neglected to respond to this, but it was brought
24 up again on rebuttal, was a few weeks -- the statement "A few
25 weeks at Project Point of Light." I don't think that

1 Mr. Brothers' participation in that program was limited to a
2 few weeks. He was released in August of 2012, and he was
3 discharged from the program successfully in July 2013. I'm
4 not sure what the date is in 2012, but it's my understanding
5 that he started that program at some point in time in 2012,
6 and completed it successfully in July of 2013. So a few weeks
7 is not accurate.

8 The government has brought up conditions -- or
9 circumstances of the offense in an effort to support its
10 position that this condition states periodic polygraphs are
11 authorized in support. I do respectfully argue that many sex
12 offender cases in general the supervision is based in large
13 part on fear of recidivism. We have folks saying, in the
14 business of sex offender treatment, that the recidivism risks
15 are low. That Dr. Pass says he should have a maintenance
16 program. It doesn't say "polygraphs," it says he should have
17 a "maintenance program."

18 He then goes to Project Point of Light. Project
19 Point of Light says, "He successfully completed our four
20 phases of treatment, but he needs continued mental health
21 treatment."

22 And we don't have anybody here saying that
23 polygraphs are necessary. Again, the condition has to be
24 reasonably related to the defendant and involve no greater
25 deprivation of liberty than is reasonably necessary. And if

1 the Court determines, upon a motion for modification, that it
2 is reasonably necessary in this particular case, then it's
3 rightfully imposed.

4 But when this Court imposed this condition back in
5 2012, it did not order periodic polygraph testing as an
6 existing condition. And the idea that the probation office is
7 somehow not going to be able to make sure he's complying, I
8 don't know what that's based on. I mean there's a lot of
9 conditions. "The defendant shall answer truthfully all
10 inquiries and follow instructions." Does that mean that
11 everybody who's a supervisee gets subject to a polygraph? You
12 know, I don't think it says that.

13 There's a reason the word "polygraph" is in that
14 one condition, and that's because it's tied to him getting
15 board certified sex offender treatment. He's not currently in
16 board certified sex offender treatment and, therefore, the
17 polygraph condition was not contemplated by this Court and not
18 included by this Court in its original order.

19 Therefore, we would ask the Court to find that
20 annual polygraph -- periodic polygraphs are not warranted in
21 this particular case because there's no evidence to support
22 that it should be added or modified as a condition of
23 Mr. Brothers' existing conditions of supervision.

24 THE COURT: Anything further?

25 MR. VALKOVCI, JR.: Your Honor, quite frankly, if

1 the Court's going to give me the opportunity -- I don't think
2 the Court should do that to a lawyer because, of course, I'll
3 stand up and talk some more if you want me to to address one
4 or two of the points raised by Mr. Brown. But if the Court
5 would give me that leeway then sure, but if not, I'll sit
6 down.

7 THE COURT: Well, I think I have heard the
8 positions of the parties, and I understand the positions of
9 the parties.

10 Given the nature of this issue and the need for
11 this issue to be clarified, I will not take this under
12 advisement but I will issue an order from the bench.

13 Now, this 4th day of March 2015, this matter coming
14 before the Court on defendant's motion for hearing to clarify
15 conditions of supervised release, and following hearing and
16 arguments of counsel, the Court makes the following findings:

17 Given the nature of the offense, namely, possession
18 of child pornography in violation of 18 United States Code,
19 Section 2252(a)(4)(B), a long-term treatment and monitoring
20 program to address the needed sex treatment and mental health
21 treatment was envisioned and intended by the Court when
22 imposing the conditions of supervision. The defendant is
23 still in that program, and has not been released from that
24 program by the Court.

25 The treatment program referenced in the conditions

1 of supervision encompasses more than one or more providers'
2 treatment regimen. Rather, this program also involves
3 rigorous long-term monitoring.

4 The requirement of continuing polygraphs
5 constitutes a reasonable measure to enable probation to
6 monitor and assure compliance with conditions of supervision,
7 both standard and additional. Therefore, this condition was
8 included in the conditions of probation.

9 Accordingly, it is hereby ordered that the
10 requirement of periodic polygraphs was intended to be and, in
11 fact, is an existing condition of supervision in this case.

12 This completes the order.

13 I am not making this part of the order, but I will
14 note that this is not necessarily a 15-year requirement for
15 polygraphs. That is really something that the probation
16 officer needs to evaluate. And if, in fact, polygraphs are
17 not deemed to be necessary any further, the probation
18 department can determine that they need not be utilized.

19 If the probation department chooses to, it can then
20 request the Court to approve that termination of polygraphs,
21 or the probation department can, in its discretion, determine
22 that they are no longer needed. I will leave that to the
23 discretion of the probation officers, in consultation with the
24 United States Attorney's Office if deemed necessary.

25 I believe this was an appropriate issue to raise,

1 and the hearing was appropriate in that, as I pointed out
2 earlier, I think it would be unfair to require the defendant
3 to be brought in for a violation for this issue without having
4 the Court with certainty state what the condition is.

5 Do either of counsel have anything additional at
6 this point?

7 MR. VALKOVCI, JR.: No, Your Honor.

8 MR. BROWN: No. No, sir.

9 THE COURT: Then that concludes this proceeding,
10 and we will be in recess until call of Court.

11 (Proceedings concluded at 12:49 p.m.)

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1 CERTIFICATE OF OFFICIAL REPORTER

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I, Kimberly K. Spangler, Federal Official Court Reporter, in and for the United States District Court for the Western District of Pennsylvania, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter, and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this ____ day of _____ 2015

KIMBERLY RUSHLOW SPANGLER, RPR
FEDERAL OFFICIAL COURT REPORTER